No. 98-1932

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GEORGE PATAKI, as Governor of the State of New York, THE NEW YORK STATE EDUCATION DEPARTMENT, RICHARD P. MILLS, as Commissioner of the New York State Education Department, THE NEW YORK STATE BOARD OF REGENTS, H. CARL MCCALL, as the New York State Comptroller, THE BOARD OF EDUCATION OF THE KIRYAS JOEL UNION FREE SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT and DR. WILLIAM J. BASSETT, JR., as District Superintendent of the Orange-Ulster BOCES,

Petitioners,

v.

LOUIS GRUMET AND CAROLINE C. SHIPLEY,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

The respondents' brief in opposition to our petition for a writ of certiorari boils down to the proposition that under this Court's jurisprudence, a statute such as the one at issue here

is legitimate only if its benefits flow to "many communities," and, in the respondents' words, "two is not many."

The notion that this case turns on whether two is many reflects a fundamental misconception of both Establishment Clause jurisprudence and the workings of the New York statute at issue. The errors that are manifest in the respondents' attempt to defend the decision below only underscore the significance of the Establishment Clause issues presented by this case and the appropriateness of either plenary consideration or summary reversal by this Court.

ARGUMENT

1. The Issue Is Not Whether Two Is Many.—The respondents take as their mantra a single sentence from this Court's opinion in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), in which the Court, describing the original creation of the Kiryas Joel public school district, observed that "the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law." *Id.* at 703.

Respondents quote from this sentence no less than ten times in their brief in opposition (at pages 5, 8, 11, 14, 15, 18, 19, 20-21, 21, and 24). They contend that the sentence announces a constitutional rule that a statute such as the one at issue not only must employ religiously neutral, educationally legitimate criteria, but also must immediately provide benefits to "many" communities. Because at present there are only two communities that indisputably qualify to form school districts under the statute, and because (as respondents point out not once but twice) "two is not many" (Brief in Opp. at 21, 24), respondents argue that the majority of the court below correctly struck down the statute.

Respondents' reliance on this language is wholly misplaced. In the quoted language from this Court's *Kiryas*

Joel opinion, the Court was simply contrasting the Kiryas Joel legislation, which designated the Village of Kiryas Joel by name and applied to no other community, with a religiously neutral statute of general application that could apply to other communities as well. The Court did not say that a statute is constitutional only if "many" other communities currently qualify.

In any event, the statute currently at issue does apply equally to "many communities." Unlike the law struck down by this Court in *Kiryas Joel*, which did not even potentially apply to any community other than Kiryas Joel, the criteria of the new statute apply equally to every municipality in the State of New York that is situated wholly within a central or union free school district. Not all such municipalities are eligible to form school districts under the new statute, but all are treated equally in the sense that their entitlement to form a school district is determined by the same neutral and legitimate criteria.

Nor can it accurately be said that only two communities will *ever* be eligible to form their own school districts under the current statute. Unlike its immediate predecessor, which applied only to the closed set of municipalities already in existence at the time of its passage, the current law allows any municipality formed in the future to qualify. Respondents identify no inherent reason, nor even any significant practical obstacle, preventing other communities from engaging in the two-step process that Kiryas Joel went through: first forming their own municipalities pursuant to New York's Village Law, and then forming their own school districts under Chapter 390.

The respondents attempt to avoid this point by citing evidence that the statute was intended specifically to benefit the Village of Kiryas Joel. That the Legislature was motivated to pass the statute by a desire to accommodate the needs of this religious community, however, does not

invalidate the statute, since such a motivation is clearly permissible, as all the opinions produced by this Court in *Kiryas Joel* recognize.

The respondents contend that this permissible motivation is transformed into an illicit intent because the neutral and legitimate criteria of the statute at issue were deliberately crafted to benefit "*only*" Kiryas Joel (Brief in Opp. at 24). The respondents' position is directly contradicted by the record, which establishes: (1) that the statute even now does not benefit *only* Kiryas Joel;[1] (2) that there is nothing in the statute that would prevent an unlimited number of communities from receiving its benefits in the future; and (3) that Governor Pataki and the Legislature believed at the time the legislation was passed that it would immediately apply to ten communities—a belief that, even if factually erroneous, negates any inference that they crafted the law to apply only to Kiryas Joel.

Finally, the respondents claim that a statute, to be constitutional, must ensure that any group "seeking a school district of their own" (Brief in Opp. at 19) must be able to get one. But this cannot possibly be the meaning of this Court's use of the term "similarly situated" in *Kiryas Joel*. Such a conception of "similarly situated" is certainly inconsistent with Justice O'Connor's recognition in her concurrence that if the state does not wish to allow any community that wants a school district to have one, "it may set forth neutral criteria that a village must meet to have a school district of its own."

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[1] Indeed, the brief in opposition contradicts itself on this point in consecutive sentences:

> The Record supporting the New York Court of Appeals['] decision establishes that the statute's criteria were drafted so that *only the Village* could take advantage of it. Indeed, the criteria were so tightly drawn that . . . *only one other municipality in addition to the Village* qualifies under the statute.

Brief in Opp. at 24 (emphasis added).

512 U.S. at 717. Justice Kennedy, too, flatly rejected the notion that a statute that does not draw lines on the basis of religion can be found unconstitutional just because it affords one religious group a benefit but does not grant it to another group that wants the same thing. 512 U.S. at 722.

2. Respondents' Position Fundamentally Misreads This Court's Establishment Clause Jurisprudence.— Respondents ultimately contend that a law setting forth entirely neutral, legitimate criteria violates the Establishment Clause if most of its benefits go to religious believers rather than being spread across a "broad spectrum." Respondents, in common with the majority below, fundamentally misconstrue the cases they cite for their "broad spectrum" analysis.

In each of the cases invoking the "broad spectrum" language, the statute at issue provided benefits on a neutral basis to both religious and nonreligious organizations or believers. In context, the "broad spectrum" language indicated the Court's conclusion that the statutes were neutral in effect because they did not single out religious institutions for special benefits not available to nonreligious groups—just as the New York law at issue here does not single out a religious group, but makes its benefits available to *any* municipality that satisfies its legitimate, neutral criteria. Nothing in any case cited by the respondents indicates that the "broad spectrum" analysis makes the constitutionality of a neutral statute depend on how many religious and nonreligious groups actually qualify for benefits. The respondents cite no case in which this Court has ever struck down a statute employing neutral, legitimate criteria simply because it disproportionately benefited religious believers. Indeed, one of the cases cited by the New York court on this point, *Wolman v. Walter*, 433 U.S. 229 (1977), upheld the provision of aid on a neutral basis to students in nonpublic schools *even though 96% of the benefits of the statute went to sectarian school students*. And, of course, the Court's most recent decision in this area,

Agostini v. Felton, 521 U.S. 203 (1997), makes clear that Establishment Clause analysis does not turn on a head-count of the religious believers among a statute's beneficiaries.

Respondents contend that *Agostini* and the other cases cited in our petition in which governmental actions have been sustained even though they primarily benefit religious believers are distinguishable because they involve aid to sectarian schools or other government benefits, and not statutes that "bestowed governmental authority upon a religious community." Brief in Opp. at 25. In so arguing, they overlook that the majority of this Court in *Kiryas Joel* did *not* accept the argument that the law there at issue should be condemned because it had the effect of conferring government authority on a religious community. *Compare* 512 U.S. at 696-702 (plurality opinion of Souter, J.), *with id.* at 716-17 (O'Connor, J., concurring), *id.* at 730 (Kennedy, J., concurring), *and id.* at 734-37 (Scalia, J., dissenting). And they nowhere explain why a statute providing for the creation of municipal public schools should somehow be subject to more stringent Establishment Clause analysis than statutes providing aid for private, sectarian instruction.

In the final analysis, the "broad spectrum" theory of the respondents and the court below is totally inconsistent with the recognition of all the Justices in *Kiryas Joel*—most particularly the two concurring Justices—that a legislative intent to accommodate a religious group is legitimate if effected through neutral legislation that does not draw lines on a religious basis. Of course, if the legislature's objective is to accommodate religious believers, it is hardly surprising that even facially neutral legislation directed toward that end will tend to benefit the group intended to be accommodated. If that is enough to condemn the legislation, this Court's approval of accommodation is nothing but hollow words.

The question this case ultimately poses is whether a statute that accommodates a religious community through the

use of neutral and legitimate criteria is to be struck down simply because it does not immediately benefit enough other groups. This Court's Establishment Clause jurisprudence—especially the various opinions in *Kiryas Joel* and the opinion in *Agostini*—clearly indicate that the answer to that question is no. Whether this Court's decisions are to be supplanted by a simplistic analysis focusing on "how many is many" is the significant issue in this case that justifies decision on the merits by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The decision of the New York Court of Appeals may be summarily reversed.

Respectfully submitted,

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